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MASOUMEH GHOLAMI KHAVEH

v.

PP

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COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEAL NO: B-05-213-08-2011]

C

31 MAY 2013

EVIDENCE: *Witness - Absent witness - Prosecution's failure to secure attendance of witness - Whether witness important and material for defence's case - Whether witness' evidence could raise reasonable doubt on*

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prosecution's case - Whether appellant deprived of fair trial - Whether conviction safe

Inspector Zahril Asri ('SP2') and his police party followed the appellant, who had taken two bags from the baggage claim area

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of the Kuala Lumpur International Airport, to a hotel. In the hotel, SP2 and his police party found the appellant in a room with another male ('Amin'). The appellant was directed to open the bags. Upon closer examination, the bags were found to contain crystal substances, subsequently confirmed to be

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methamphetamine weighing 2,865.6 grammes in total. After the recovery of the drugs from the two bags, SP2 prepared a search list on which both the appellant and Amin placed their signatures. The appellant was subsequently charged and tried before the High Court for an offence under s. 39B(1)(a) of the Dangerous Drugs

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Act 1952. At the conclusion of the trial, the appellant was convicted and sentenced to mandatory death penalty. Amin was never charged in the court together with the appellant but was detained under the Dangerous Drugs (Special Preventive Measures) Act 1985. Hence, the appeal by the appellant on the

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grounds, *inter alia*, that (i) the learned trial judge had erred in law in failing to appreciate that Amin's presence in the court was important to the defence of the appellant; and (ii) that there had been miscarriage of justice due to the prosecution's failure to produce Amin at the trial although Amin was offered as a witness

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to the defence. During the trial, the prosecution tried to remedy the failure by recalling the investigating officer, SP3, to give an

explanation to the court on the various steps taken to secure the attendance of Amin. SP3 informed the court that efforts to trace Amin was conducted upon the court's instruction to do so and it was found that Amin had been deported to his home country one month before the commencement of the trial.

Held (allowing appeal; quashing and setting aside conviction and sentence)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) SP3 ought to have conducted a trace on Amin to secure his attendance before the trial started and certainly before he was offered to the defence. However, there was no effort taken by SP3 to find out the whereabouts of Amin before the commencement of trial. The conduct of SP3, to trace Amin only after the commencement of the trial, was most unsatisfactory and unacceptable. (para 15)

(2) Even though Amin was not an important witness in the unfolding of the narrative of the prosecution's case, it did not relieve the learned trial judge from determining whether Amin was an important and material witness as far as the defence was concerned. The learned trial judge had misdirected herself in that she overlooked and failed to appreciate the importance of Amin to the defence's case as he was the one who could raise a reasonable doubt on the prosecution's case. Hence, the appellant had been seriously prejudiced. (para 18)

(3) The appellant's right to a fair trial had been compromised as a result of the failure on the part of the prosecution to secure the attendance of Amin. The conviction of the appellant was thus rendered unsafe as the appellant might have lost a chance which was fairly opened to her of being acquitted. There had been occasioned a failure or miscarriage of justice. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Inspektor Zahril Asri ('SP2') dan pasukan polisnya mengekori perayu, yang telah membawa dua beg dari bahagian tuntutan bagasi di Lapangan Terbang Antarabangsa Kuala Lumpur, ke sebuah hotel. Di hotel tersebut, SP2 dan pasukan polisnya menemui perayu di sebuah bilik dengan seorang lelaki ('Amin'). Perayu diarahkan membuka beg-beg tersebut. Atas pemeriksaan

A lanjut, beg-beg tersebut didapati mengandungi bahan-bahan kristal, yang kemudiannya disahkan sebagai methamphetamine yang kesemuanya seberat 2,865.6 gram. Selepas penemuan dadah daripada dua beg tersebut, SP2 menyediakan senarai carian yang ditandatangani oleh perayu dan Amin. Perayu kemudiannya dituduh
B dan dibicarakan di Mahkamah Tinggi bagi satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Di akhir perbicaraan perayu disabitkan dan dijatuhkan hukuman mati mandatori. Amin tidak dituduh di mahkamah bersama dengan perayu tetapi telah ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah
C Pencegahan Khas) 1985. Maka rayuan ini oleh perayu atas alasan, antara lain, bahawa (i) yang arif hakim bicara telah terkhilaf dari segi undang-undang atas kegagalan mempertimbangkan bahawa kehadiran Amin di mahkamah adalah penting bagi pembelaan perayu; dan (ii) bahawa terdapat ketidakadilan atas kegagalan pihak
D pendakwaan mengemukakan Amin semasa perbicaraan walaupun Amin ditawarkan sebagai saksi kepada pembelaan. Semasa perbicaraan, pihak pendakwaan cuba untuk memulihkan kegagalan tersebut dengan memanggil semula pegawai siasatan, SP3, untuk memberikan penjelasan kepada mahkamah berkaitan dengan
E langkah-langkah yang diambil untuk memastikan kehadiran Amin. SP3 memberitahu mahkamah bahawa usaha untuk mengesan Amin dilakukan selepas diarahkan oleh mahkamah untuk berbuat demikian dan didapati bahawa Amin telah dihantar pulang ke negara asalnya sebulan sebelum perbicaraan bermula.

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Diputuskan (membenarkan rayuan; membatalkan dan mengetepikan sabitan dan hukuman)

Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

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(1) SP3 sepatutnya telah mula mengesan Amin supaya dapat memastikan kehadirannya sebelum perbicaraan bermula dan sewajarnya sebelum dia ditawarkan kepada pihak pembelaan. Walau bagaimanapun, tiada usaha yang dilakukan oleh SP3 untuk mencari Amin sebelum perbicaraan bermula. Tindakan
H SP3, untuk mengesan Amin hanya selepas perbicaraan bermula, adalah amat tidak memuaskan dan tidak boleh diterima.

(2) Walaupun Amin bukan saksi yang penting bagi pemaparan naratif kes pihak pendakwaan, ia tidak melepaskan yang arif
I hakim bicara daripada mempertimbangkan sama ada Amin adalah saksi penting dan material kepada pihak pembelaan. Yang arif hakim bicara telah tersalah arah di mana beliau terlepas pandang dan gagal mempertimbangkan kepentingan

Amin kepada kes pihak pembelaan kerana dia merupakan orang yang boleh menimbulkan keraguan munasabah terhadap kes pihak pendakwaan. Dengan itu, perayu telah diprejudiskan secara serius.

(3) Hak perayu untuk perbicaraan yang adil telah dikompromi disebabkan oleh kegagalan pihak pendakwaan memastikan kehadiran Amin. Oleh itu, sabitan perayu menjadi tidak selamat dan perayu kemungkinan telah kehilangan peluang yang terbuka secara adil untuk dilepaskan. Dengan itu telah berlaku kegagalan keadilan atau ketidakadilan.

Case(s) referred to:
Lim Hock Boon v. PP [2007] 4 CLJ 114 CA ***(refd)***
Mraz v. The Queen [1955] 93 CLR 493 ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Asnawi Yusuf [2012] 3 CLJ 41 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a), 39B(3)

For the appellant - N Sivananthan (Tina Ong with him); M/s Sivananthan
For the respondent - Tetralina Ahmed Fauzi; DPP

Reported by S Barathi

JUDGMENT

Azahar Mohamed JCA:

[1] Masoumeh Gholami Khaveh ("the appellant"), an Iranian national, was charged and tried before the Shah Alam High Court for trafficking in 2865.6g of dangerous drugs, namely methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"), and punishable under s. 39B(2) of the DDA. The offence was said to have been committed on 15 November 2009 at about 8.10am at Room No. 2306, One World Hotel, First Avenue, Bandar Utama City Centre, in the District of Petaling, in the State of Selangor Darul Ehsan.

[2] At the conclusion of the trial, the learned trial judge convicted the appellant and sentenced her to the mandatory death penalty prescribed by the DDA. The appellant then appealed to this court. We heard her appeal, wherein at its conclusion we unanimously allowed it. As a result, the conviction was quashed and the sentence set aside. We now give our reasons.

[3] The salient facts adduced by the prosecution at the trial in the High Court had been fully and well set out in the judgment of the learned trial judge (see: pp. 371-379 of vol. 4 of the appeal record). Here, we will only highlight in the following paragraphs, very briefly, the relevant facts in so far as they are relevant to the issue which arises for decision in this appeal before us.

[4] On 15 November 2009 at about 5.15am, Inspector Zahril Asri bin Mohd Zain (SP2) and a police party comprising of nine other police personnel were on duty at the Kuala Lumpur International Airport (KLIA). In particular, SP2 and his police party kept a close surveillance at the baggage claim area. At about 6.15am, SP2 saw the appellant taking two bags (exhs. P6A and P6B) from the baggage claim area and then she boarded a taxi. The two bags were placed in the boot of the taxi. The taxi then left KLIA.

[5] SP2 and his police party followed the taxi from KLIA to One World Hotel, First Avenue, Bandar Utama City Centre. At the hotel, the appellant alighted from the taxi and the taxi driver took both the bags out of the taxi and handed them to Ahmad Syafiq bin Hassan (SP1), the bellman of the hotel who next placed the bags on a trolley. The appellant went into the lobby followed by SP1 with the bags. The appellant then sat down whilst the bags were placed at the side of the registration counter. Afterward, a male whom SP2 believed to be a foreigner went towards the appellant. The male then went to the registration counter followed by the appellant.

[6] After that, both of them proceeded towards the lift lobby and went into one of the lifts. SP2 then saw SP1 pushed the trolley to the lift. SP2 followed SP1. In the lift, SP1 pressed for floor 23. As soon as the lift door opened at the said floor, SP1 went out of the lift. SP2 followed SP1 who pushed the trolley to Room 2306. There, SP1 knocked on the door. Once the door was opened, SP1 entered the room to deliver the two bags. Almost immediately, SP2 and his police party came into the room. SP2 introduced himself by showing his authority card to both the appellant and the male individual. The male individual was identified as Amin Barghjel Veh Majid (Amin). We will say more about Amin later in this judgment.

[7] SP1 was then asked to leave the room. Subsequently, SP2 directed the appellant to open the bags. The first bag which was opened by the appellant was exh. P6B. The appellant herself took

out the contents of the bag. Once it was empty, SP2 examined the bag. SP2 felt that the bottom of the bag appeared to contain something as there were marks of bulges. SP2 then pierced the cover and there he found one plastic packet containing crystal substances, suspected to be dangerous drugs, namely methamphetamine.

[8] The second bag opened by the appellant was exh. P6A.The appellant was directed to empty it after which SP2 examined the bag. SP2 also felt that the bottom of the bag appeared to contain something as there were marks of bulges and there SP2 also found one plastic packet containing crystal substances, suspected to be methamphetamine.

[9] The two packets were then sent to the chemistry department for chemical examination and analysis. The two packets were later confirmed by the chemist, Zulkfeli bin Mohd Edin (SP4) to contain methamphetamine weighing in total 2865.6g.

[10] After the conclusion of the case for the prosecution, the learned trial judge came to the finding that the prosecution had made out a *prima facie* case against the appellant and therefore called upon the appellant to enter on her defence in respect of the offence charged. It was the finding of the learned trial judge that the appellant had custody and control of exhs. P6A and P6B in which the offending drugs were hidden and invoking the statutory presumption under s. 37(d) of the DDA, the appellant was therefore deemed to have been in possession of the drugs, and deemed to have known the nature of the drugs. Having regard to the definition under s. 2 of the DDA, which defines trafficking to also include 'transporting' and 'carrying', the learned trial judge then made a finding that the appellant was in fact trafficking in the dangerous drugs. Based on the authority of *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129; [2006] 3 MLJ 193, the learned trial judge was entitled and correct in making a finding that a *prima facie* case of trafficking in the said offending drugs had been made out against the appellant without invoking the presumption under s. 37(da) of the DDA.

[11] The appellant elected to give sworn evidence. The appellant did not dispute that she had carried the two bags from Iran to Kuala Lumpur. However, it was her testimony that she had no

knowledge at all about the drugs inside the said bags as she was merely carrying them for a friend by the name of Shila to be delivered to Shila's friend by the name of Amin in Kuala Lumpur. The appellant denied any knowledge of the presence of drugs concealed in the two bags.

[12] In the Petition of Appeal, the appellant attacked the judgment of the learned trial judge on a number of grounds. In the light we took of this appeal, we are of the view that it is unnecessary to deal with all of them in this judgment. Before us, what turned out to be the most important point raised by learned counsel for the appellant concerned the learned trial judge's observation in her grounds of judgment to the effect that the prosecution did not rely on Amin to prove its case against the appellant, and since it was the defence that required Amin's presence in court, therefore his absence had not injured or prejudiced the prosecution's case. Learned counsel for the appellant argued that the learned trial judge made an error in law in that she failed to appreciate that Amin's presence in court was important to the defence of the appellant. He then argued that there had been a miscarriage of justice given that the prosecution had failed to produce Amin at the trial even though Amin was offered as a witness to the defence. On the facts of the present case, we find there is much force in this argument.

[13] To appreciate the point raised by learned counsel, we think it is useful to state briefly the pertinent factual background. It will be recalled that both the appellant and Amin were in Room 2306 when SP2 and his police party came in and examined the two bags. More significantly, after the drugs were recovered from the two bags, SP2 prepared a search list (exh. P8). Both the appellant and Amin then placed their signatures on P8. Amin was never charged in court together with the appellant but he was detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 at the Muar Rehabilitation Centre for two years from 24 January 2010. The next point which we think has a very strong bearing on the issue is the detention order (exh. D35) which revealed that Amin was involved in drugs activities since early January 2007. It is important to note that the allegation of fact at para. 8 in exh. D35 states that Amin was the person responsible in the delivery of the Methamphetamine drugs weighing 4kg from KLIA to One World Hotel. It is also relevant

to note that the appellant was arrested by the police only after Amin appeared at the One World Hotel and entered the same room as the appellant. Even more to the point, the appellant could have been arrested at KLIA when she was seen taking the two bags from the baggage claim area. Another point that must be mentioned here is that in the consent to prosecute under s. 39B(3) of the DDA (exh. P1), it is stated that the appellant was charged with a common intention to traffic in dangerous drugs. The significant point here is that in the charges (exhs. P2 and P3), the appellant was the only person named.

[14] At this juncture, it is imperative that we should highlight a crucial fact. It is this. As can be seen in exh. P4, at the end of the prosecution's case, Amin was one of the prosecution's witnesses who were offered to the defence. This then brings into sharp focus the appellant's intention to call Amin to testify which was duly informed to the prosecution before the commencement of the defence case. However, as it turned out, until the close of the defence case, the prosecution had failed to produce Amin in court as requested by the defence.

[15] Continuing with the sequence of events at the trial before the learned trial judge, after the defence closed its case, the prosecution had tried to remedy the said failure by recalling the investigating officer, Chief Inspector Azizan bin Ganti (SP3) to give an explanation to the court on the various steps taken to secure the attendance of Amin. According to SP3, he had contacted the detention centre at the Narcotics Department, Bukit Aman on 30 May 2011 to obtain clarification regarding Amin's status in the light of the detention order, exh. D35. SP3 then contacted the Muar Rehabilitation Centre and was informed that Amin was sent to the detention centre on 24 January 2010, but he had been released *via* a writ of *habeas corpus* dated 8 February 2011 (exh. P49). Subsequently, on 16 June 2011, SP3 contacted the Muar Immigration Department where he was informed that Amin had been deported back to his home country on 16 March 2011, which was approximately a month before the commencement of the trial before the learned trial judge. It is the testimony of SP3 he had only realised on 16 June 2011 that Amin had in fact been deported to his home country. SP3 also said that his effort to trace Amin was only conducted on 30 May 2011 after he was instructed to do so by the court. It is quite important to note that there was no effort whatsoever by SP3 to find out the whereabouts of Amin before the commencement of the trial on

A 11 April 2011. In our view, the conduct of SP3 as the investigating officer of the case is most unsatisfactory and unacceptable. SP3 ought to have conducted a trace on Amin to secure his attendance before the trial started and certainly before he was offered to the defence.

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[16] Against the backdrop of the above, five important points should now be highlighted here. First, the appellant has forwarded a defence of innocent carrier in that she never at anytime denied that she carried the two bags but disputed having
C knowledge of the drugs hidden in them. Secondly, the existence and involvement of Amin in this case cannot be disputed. Thirdly, at the close of the prosecution's case, the prosecution offered Amin but could not make him available at the trial. Fourthly, the appellant's counsel at the trial had informed the prosecution that
D he intended to call Amin as a defence witness. Fifthly, the testimony of Amin might well have established that the appellant had no prerequisite knowledge of the drugs hidden in the two bags.

E **[17]** Therefore, under such circumstances, in our judgment, the pertinent issue which the learned trial judge had to decide was whether the appellant's right to a fair trial had been compromised. In this regard, the learned trial judge had this to say in her grounds of judgment:

F > In the case before me, the Prosecution need not rely on Amin at all and it was the Defence that required him. Therefore Amin's absence had not injured or prejudiced the Prosecution's case. Further, Amin was not "important and material witness" as stated in the case.

G **[18]** In our judgment, in the context of the present case, this is a serious misdirection. Even though Amin was not an important witness in the unfolding of the narrative of the prosecution's case, that did not relieve the learned trial judge from determining
H whether Amin was in point of fact an important and material witness as far as the defence was concerned. The learned trial judge misdirected herself in that she overlooked and failed to appreciate the importance of Amin to the defence's case as he was the one who could raise a reasonable doubt on the prosecution's case. This was never considered by the learned trial
I judge. In the light of this unsatisfactory feature, in our judgment, the appellant had been seriously prejudiced. In *PP v. Asnawi Yusuf*

[2012] 3 CLJ 41; [2011] 4 MLJ 16, this court held that it is the bounden duty of the prosecution to secure the attendance of witnesses once they were offered as witnesses to the defence. Likewise, in the present case the prosecution has the bounden duty to secure the attendance of Amin. The appellant may waive the attendance of Amin. It is true that if Amin was produced in court, he might not be able to give favorable evidence for the appellant, but that did not detract from the prosecution's duty to produce him in court. The appellant cannot be deprived of Amin's attendance in order to prove her innocence.

[19] In our judgment, on the facts and the prevailing circumstances of this case, the appellant's right to a fair trial has been compromised as a result of the failure on the part of the prosecution to secure the attendance of Amin, which has the effect of rendering the conviction very unsafe. The appellant may thereby have lost a chance which was fairly opened to her of being acquitted and that there had been occasioned a failure or a miscarriage of justice (see: *Mraz v. The Queen* [1955] 93 CLR 493 quoted with approval in *Lim Hock Boon v. PP* [2007] 4 CLJ 114; [2007] 1 MLJ 46). This appeal was, therefore, allowed on this ground alone. Accordingly, we quashed and set aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.